

# ***In re Lenora J. Pernell***

**Docket No. 00-12**

**Date of Decision: August 10, 2001**

**Cite as: *In re Pernell* (8/10/01)**

**Before: *Per Curiam***

**Stay**

**Permanent stay**

**Standard of review**

**Abuse of discretion**

## **ON APPEAL OF DENIAL OF PERMANENT STAY**

*Per Curiam.*

The General Counsel of the Personnel Appeals Board (PAB) has appealed a May 21, 2001 Order issued by the Administrative Judge assigned to this matter, in which he denied Petitioner's Request For A Permanent Stay.<sup>1</sup> On July 30, 2001, we requested a clarification of that Order from the Administrative Judge, which was provided on August 1, 2001. This appeal is being heard pursuant to 4 C.F.R. §28.133(f).

The Administrative Judge had previously granted two temporary stays to Petitioner. An initial temporary stay request, which is an *ex parte* matter, "shall be granted by the Board member designated by the Board Chair to entertain it unless, in the opinion of that member, the request either fails to satisfy the requirements of this paragraph or, on its face, conclusively establishes the absence of a prohibited personnel practice." 4 C.F.R. §28.133(a) (emphasis added). A request for a permanent stay under Section 28.133(b),<sup>2</sup> however, is governed by Section (e) of the same regulation:

the Board or the designated member thereof shall consider and balance such established equitable factors as:

---

<sup>1</sup> Respondent filed GAO's Response to Petitioner's Appeal of the Administrative Judge's Denial of Her Request for a Permanent Stay on June 11, 2001. The Board notes the Agency's argument that the appeal is untimely, but accepts the PAB General Counsel's statement that service was not perfected until Tuesday, May 22, 2001.

<sup>2</sup> This section also applies to a further temporary stay. If the request is based on the need for time to complete an investigation, Section (e)(2) requires that "the duration of that further stay shall not exceed the amount of time necessary to complete the investigation in the exercise of a high degree of diligence."

(1) The likelihood that the personnel action sought to be stayed involves a prohibited personnel practice; and

(2) The nature and extent of the injury that the employee and the agency likely will suffer if the requested stay is or is not issued.

4 C.F.R. §28.133(e).

Given the lack of clear guidelines as to the weight to be given to each of the equitable factors in Section 28.133(e) and given the fact that a balancing of evidence may be required, we conclude that the decision to grant or deny a permanent stay is committed to the discretion of the presiding judge. Such decision should not be reversed by the Board unless there has been an abuse of discretion or there has been clear error in the interpretation of controlling law or regulations. As set forth below, we find neither abuse of discretion nor error in interpretation of controlling law or regulations on the part of the Administrative Judge. Therefore, we affirm the Administrative Judge's Order of May 21, 2001, as clarified on August 1, 2001.

In 1993, the PAB promulgated the provision currently found at Section 28.133 of our regulations. In its explanation accompanying the proposed new provision in April 1993, the PAB noted: "This section on requests for stays of personnel actions has been substantially rewritten to provide more detailed procedures for such requests and to provide more specific standards to guide the Board's disposition of such requests." Explanation of the Proposed Changes to the Regulations of the GAO Personnel Appeals Board at 9 (Apr. 26, 1993). When the regulations were issued in final, the explanation noted that

[T]he standards in subsection (a) only relate to *ex parte* stays issued for not more than 30 days. In order to obtain a longer temporary stay or a permanent stay, the General Counsel would have to meet the more stringent requirements set forth in subsections (b) through (e).

58 Fed. Reg. 61988, 61991 (Nov. 23, 1993) (emphasis added).

The PAB General Counsel argues that Section (e) "does not place any additional substantive or procedural or evidentiary requirements on the General Counsel when she is seeking a permanent stay than when she is seeking a further temporary stay." Appeal at 10. Reasoning that the standards outlined in Section (e) for both a further temporary stay and a permanent stay are the same, she argues that her "reasonable cause determination is entitled to even greater deference [when she is seeking a permanent stay] than when she is seeking a stay so that she can conduct or continue an investigation. . . ." *Id.* The General Counsel seems to assume that because she met the standards for a further temporary stay, as evidenced by the Administrative Judge's January 29, 2001 Order, she automatically met the standards for a permanent stay. However, the Order of January 29<sup>th</sup> granting the further temporary stay is specifically tied to allowing the completion of the PAB Office of General Counsel's investigation "in the exercise of a high degree of diligence" (quoting 4 C.F.R. §28.133(e)(2)).

The request for a permanent stay stands in a different posture. We do not see any regulatory support for the General Counsel's position and therefore agree with the Administrative Judge that such an interpretation is untenable. If the Board had intended to continue applying the MSPB standard to permanent stay requests, it could have said so in either the 1993 regulation or in its explanatory comments. It did neither. Instead, when it adopted the new regulation in 1993, this Board explicitly stated that the standards to be applied under Section (e) would be "more stringent" than the standards governing *ex parte* stays under Section (a). We therefore conclude that the Administrative Judge's May 21 Order, as clarified, correctly interpreted Section 28.133(e)(1).

Petitioner also argues that Section 21.133(e)(2) does not make irreparable injury a criterion for assessing stay requests and that the Administrative Judge's reference to irreparable injury is reversible error. Appeal at 7-8. We disagree with Petitioner.

The Administrative Judge made clear in his order that Section 28.133(e)(2) does not explicitly require proof of irreparable harm; he merely opined that the irreparability of any harm (to either party) is relevant. Order at 7, n.5. In this respect, he is clearly correct. The regulations do not instruct us how to balance the competing factors. Common sense dictates that there are different degrees of harm that an employee or the Agency might suffer. Harm that is irreparable must carry some greater weight than harm that can be remedied by a final decision. The Administrative Judge merely points out the obvious when he states that irreparability is relevant in balancing the competing injuries that would result from granting or not granting a stay.

Petitioner also argues that the Administrative Judge committed harmful error because he failed to give due consideration to various arguments and documents in the record. However, as stated above, we believe that an "abuse of discretion" standard is appropriate in reviewing a presiding judge's evaluation of the evidence in support of and in opposition to a permanent stay request. There is no basis for concluding that the Administrative Judge's discussion of the record was anything other than thorough and fair. His analysis of the evidentiary record was well reasoned. His findings with respect to the injuries suffered by each of the parties and his balancing of those injuries was not an abuse of discretion.

\* \* \* \*

For the foregoing reasons, we affirm the Administrative Judge's Order of May 21, 2001, as clarified.

**SO ORDERED.**